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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

JOHN W. HILL,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Respondent.

No. 665

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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No. .....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of Missouri, in a cause lately pending in said court styled and numbered John W. Hill, plaintiff-respondent, v. Terminal Railroad Association of St. Louis, a corporation, defendant-appellant, No. 40,558, by which the Supreme Court of Missouri enforced a remittitur of $10,000.00 from a judgment for $25,000.00 entered in petitioner's favor by the

Circuit Court of the City of St. Louis, Missouri, after enforced remittitur in said Circuit Court from a verdict of $37,721.00 (R. 189-190, 192, 192-193), in an action under the Federal Employers' Liability Act.

Division No. 1 of the Supreme Court of Missouri rendered its opinion and judgment on June 14, 1948 (R. 199-200), but the same were set aside and vacated, and the cause transferred to the Supreme Court of Missouri, En Banc, on July 12, 1948 (R. 205; Cf. **State v. Hamey**, 168 Mo. 167, 67 S. W. 620, 621 [1]. The Supreme Court of Missouri, En Banc, rendered an opinion and judgment on December 13, 1948 (R. 206-218) adopting the opinion in Division No. 1 of the Supreme Court of Missouri as the opinion of the Supreme Court of Missouri, En Banc. This petitioner, in due time, filed in the Supreme Court of Missouri, En Banc, his motion for a rehearing, or for alternative relief (R. 219-221), which was entertained, but was denied on January 7, 1949 (R. 221), at which time the Supreme Court of Missouri, En Banc, entered judgment enforcing remittitur as of December 21, 1948 (R. 221-222).

OPINIONS BELOW.

There was no opinion in the trial court.

The opinion of Division No. 1 of the Supreme Court of Missouri, subsequently adopted as its opinion by the Supreme Court of Missouri, En Banc, appears at pages 207-218, inclusive, of the printed record herewith filed. Such opinion is not yet officially reported, but is reported as **Hill v. Terminal Railroad Assn. of St. Louis**, 216 S. W. 2d 487.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 237 of the Judicial Code, as amended by the Act of June 25, 1948 (62 Stat. ..., 28 U. S. C., Section 1257).

The judgment of the Supreme Court of Missouri is a final judgment, rendered on January 7, 1949, as of December 21, 1948 (R. 221-222), being subject to no further review or correction by any other state court. It has ended the litigation between the parties by determining their rights so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the Supreme Court of Missouri has directed.

By definition of the Supreme Court of Missouri, its judgment constituted an "enforced remittitur." **Sofian v. Douglas**, 329 Mo. 258, 23 S. W. 2d 126; **Joice v. M.-K.-T. R. Co.**, 354 Mo. 439, 189 S. W. 2d 569.

Petitioner did not voluntarily seek a remittitur in order to avoid a new trial for an otherwise reversible error as in **Koenigsberger v. Richmond Silver Mining Co.**, 158 U. S. 41, 39 L. ed. 889; **Hansen v. Boyd**, 161 U. S. 397, 40 L. ed. 746; **Chesbrough v. Woodworth**, 244 U. S. 72, 61 L. ed. 1000.

In such cases, as occasionally under the Federal Employers' Liability Act, a verdict may be based upon a clearly erroneous mathematical computation or may be in excess of the amount to which the plaintiff is entitled as a matter of law. Cf. **Bartelbaugh v. Pennsylvania R. Co.** ... Ohio ..., 82 N. E. 2d 853. In this case the verdict represented an exercise of the jury's discretion to determine the amount to which petitioner was entitled. The basic question is the extent to which the exercise of this function may be undermined by redetermination in the appellate court.

The remittitur was in effect an enforcement by the Supreme Court of Missouri of its policy of maintaining a uniform measure of maximum damages in actions for damages for personal injuries, including actions brought under the Federal Employers' Liability Act. **Ford v. L. & N. R. Co.**, 355 Mo. 362, 196 S. W. 2d 163; **Mickel v. Thompson**, 348 Mo. 991, 156 S. W. 2d 721, 728; **Lynch v. Baldwin** (Mo. Sup.), 117 S. W. 2d 273.

Compliance with an erroneous judgment does not preclude its review. **O'Hara v. McConnell**, 93 U. S. 150, 23 L. ed. 840, and a judgment requiring a remittitur is adverse to the party required to remit. See **Alexander v. Cosden Pipe Line Co.**, 290 U. S. 484, 78 L. ed. 452. Where a plaintiff has consented to an enforced remittitur, the judgment enforcing the remittitur is final. See Robertson & Kirkham, The Jurisdiction of the Supreme Court of the United States, Section 24. Cf. **Union Pacific Railroad Co. v. Hadley**, 246 U. S. 330, 62 L. ed. 751; **Minneapolis & St. Paul Railway v. Moquin**, 283 U. S. 520, 75 L. ed. 1243.

Petitioner, at the first opportunity for him so to do, specifically set up and claimed a right, privilege and immunity under the Federal Employers' Liability Act, for, in his brief as respondent in Division No. 1 of the Supreme Court of Missouri (which brief is filed with the Clerk of this Court as Exhibit B to this petition),[1] in answer to the brief of respondent here as appellant in said court (which brief is filed with the Clerk of this Court as Exhibit A to this petition),[1] this petitioner specifically asserted (Exhibit B hereto, pp. 12-13):

> "Under the federal rule the question of whether the verdict of the jury is excessive is not for the courts

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1 These briefs were duly filed in the Supreme Court of Missouri, pursuant to Rule 1.08 of that Court, requiring the contentions to be urged on appeal to be stated therein; Cf. R. 198, 199, 205, 206.

on appeal and this rule appears to be controlling in the state courts."

and, further (Exhibit B hereto, p. 18):

"Cases arising in the state courts under the Federal Employers' Liability Act must be settled according to the general principles of law administered in the federal courts. In the federal courts the question of whether a verdict is excessive cannot be considered by an appellate court. Therefore, in cases arising in a state court under the Federal Employers' Liability Act, an appellate court cannot consider whether the verdict is excessive."

Petitioner thereafter preserved his claim under the Federal Employers' Liability Act in the Supreme Court of Missouri En Banc, for in his supplemental brief there filed (which brief is filed with the Clerk of this Court as Exhibit E to this petition),[1] he again made substantially the same assertions (Cf. Exhibit E, pp. 3, 7-10).

The Supreme Court of Missouri did not specifically pass upon petitioner's claim in its opinion (R. 207-218), but it inferentially denied said claim in its said opinion by holding that the damages awarded petitioner were excessive, and by ordering an enforced remittitur as a condition to the affirmance of petitioner's judgment (R. 217-218).

Petitioner further preserved his said claim after rendition of the opinion and decision of the Supreme Court of Missouri, first in petitioner's motion for a rehearing filed in Division No. 1 of that court on June 24, 1948 (R. 200-202, 205) and, finally, in his motion for rehearing filed in that court en banc on December 21, 1948 (R. 218-221), which was overruled on January 7, 1949 (R. 221).

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[1] These briefs were duly filed in the Supreme Court of Missouri, pursuant to Rule 1.08 of that Court, requiring the contentions to be urged on appeal to be stated therein; Cf. R. 198, 199, 205, 206.

Since this action was brought under the Federal Employers' Liability Act, and since the Supreme Court of Missouri undertook to determine that the damages awarded to the petitioner by the trial court were "excessive", a federal question was necessarily passed upon by the Supreme Court of Missouri.

To determine otherwise would in effect confer upon the state courts, in cases arising under a federal statute, the power to prevent any review of their determinations that damages awarded by juries and trial courts were "excessive". The alternative to an enforced remittitur is a reversal and a new trial, and this Court has ruled that reversal upon a refusal to consent to an enforced remittitur is not reviewable because of a lack of finality. **Mississippi Central Railroad Company v. Smith,** 295 U. S. 718, 79 L. ed. 1673. Therefore, no other means of review would be available. It is submitted that in the present case the judgment of the Supreme Court of Missouri was final

> "when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial action of entering the judgment which the appellate court had directed."

Department of Banking v. Pink, 317 U. S. 264, 87 L. ed. 254.

QUESTIONS PRESENTED.

1. In an action under the Federal Employers' Liability Act, is the highest appellate court of a state authorized to review and redetermine the damages determined by the jury and the trial court where no reversible error was committed in the trial and where the verdict did not result from passion, prejudice or corruption and did not reflect

some error of law in the admission of evidence or in the charge of the trial judge?

2. In an action under the Federal Employers' Liability Act, is the highest appellate court of a state authorized, in the guise of determining the "excessiveness" vel non of the damages fixed by the jury and the trial court, to establish maximum limits upon the amount of damages recoverable for personal injuries where no such maximum limits are fixed by the federal statute?

SUMMARY STATEMENT.

Petitioner, plaintiff in the trial court, instituted an action under the Federal Employers' Liability Act in the Circuit Court of the City of St. Louis, Missouri, on August 8, 1946 (R. 1). The case was tried by a jury which returned a verdict in petitioner's favor for $37,721.00, upon which judgment was entered (R. 6, 188-189). Respondent filed a motion for a new trial alleging, among other grounds, that the verdict was excessive (R. 190-191). The trial judge required a remittitur of $12,721.00, as a condition of overruling respondent's motion for new trial, thus reducing the judgment to $25,000.00, which judgment was entered (R. 192-193). From this judgment respondent appealed to the Supreme Court of Missouri (R. 193-195). Petitioner, respondent in the Supreme Court of Missouri, denied the authority of that court to redetermine the amount of damages assessed by the jury and the trial court, under the Federal Employers' Liability Act, in the absence of passion, prejudice or corruption or some error of law. Cf. Reference to briefs filed by this petitioner ante, p. 4. Nevertheless, Division 1 of the Supreme Court of Missouri, finding all of respondent's allegations of error to be without merit save that the verdict was "excessive," ordered a remittitur of $10,000.00 from the

judgment of the trial court—thus reducing it from $25,000.00 to $15,000.00—within 10 days thereafter on penalty of reversal and remand for new trial (R. 199-200, 218).

Petitioner moved to set aside the enforced remittitur and to affirm unconditionally the judgment of the trial court, or, in the alternative, that a rehearing be granted, or that the case be transferred to the court en banc (R. 200-202). Petitioner's motion was overruled but respondent's motion to transfer to the court en banc was sustained (R. 204, 205). Petitioner again challenged the authority of the Supreme Court of Missouri to redetermine the amount of damages (Cf. Reference to petitioner's supplemental brief, ante, p. 5). The court en banc adopted the opinion of Division 1 on December 13, 1948 (R. 206-218). On December 21, 1948, petitioner moved the Supreme Court of Missouri en banc to set aside the enforced remittitur and to affirm the judgment of the court unconditionally or to grant petitioner a rehearing (R. 218-221). In the event neither alternative of the motion was granted, petitioner consented to remit $10,000.00 (R. 221). On January 7, 1949, petitioner's motion was overruled (R. 221). On January 7, 1949, upon motion of petitioner, the mandate of the Supreme Court of Missouri was ordered stayed for 90 days (R. 221-223).

The following evidence was presented with regard to the injuries sustained by petitioner: At the time of the injury petitioner was 50 years old (R. 7), in good health (R. 8), had sufficient seniority as an employee of respondent and was earning more than $300.00 per month (R. 8-9). At the time of the trial petitioner's life expectancy was 20 2/10 years (R. 126). He had sustained injuries to his right foot, his nerves and to his nervous system (R. 13; 132; 138). Three of his toes were fractured, with lacera-

tions and tearing of the soft tissue about the toe (R. 85; 130-131). All of the great toe and part of the second toe were amputated (R. 85-86); the fracture of the third toe had not healed and the evidence indicated it probably would not heal without surgery (R. 86; 87). An infection developed, which required trimming in the area of the stumps of the amputated toes (R. 13). The nerves to the amputated toe were caught in the scar tissue causing neuroma which caused extreme tenderness and pressure (R. 89-90; 139). There was very little padding over the stumps of the amputated toes and the scar tissue where the great toe was amputated adhered to the bone (R. 89; 131). The stub of the second toe, about one-fourth of an inch long, was pulled upward and backward so that petitioner could not bring or keep it down (R. 88). Petitioner walked with a limp favoring the right foot, used a cane for assistance, and the toe of the shoe on the right foot was cut out (R. 88). Physicians testified that the end of the amputated big toe should be dissected away, the stump of the second toe should be removed, and new tissue from the left leg transplanted (R. 89-90). Petitioner had earned nothing since his injury (R. 14), and the physicians stated that petitioner would never be able to walk a great distance or perform any labor which involved his being on his weight or walking on rough ground (R. 90-91; 132-133). Respondent offered evidence to the effect that petitioner would be able to work and that two other persons with amputated toes were able to work as switchmen (R. 143; 153-157).

REASONS FOR GRANTING THE PETITION.

1. The Supreme Court of Missouri has decided a federal question of substance not heretofore determined by this Court.

2. The Supreme Court of Missouri has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, and particularly not in accord with the decisions of this Court in **Lavender v. Kurn**, 327 U. S. 645, 90 L. ed. 916, and **Chesapeake & O. R. Co. v. Kelly**, 241 U. S. 485, 60 L. ed. 1117.

3. The Supreme Court of Missouri has rendered a decision, on a federal question of substance, which conflicts with the decisions of other state appellate courts dealing with the same question.

This Court has never specifically defined the limitations which federal law imposes upon the authority of the appellate courts of the states to review and reverse for "excessiveness" verdicts of juries and judgments of trial courts in actions instituted under the Federal Employers' Liability Act.[2] At the outset it must be emphasized that this is not a case in which the alleged excessiveness of a verdict is attributable to passion, prejudice or corruption upon the part of the jury. No such argument was made and if made sub silentio was not accepted by the Supreme Court of Missouri, as there is nothing in the opinion of the Supreme Court of Missouri which indicates that the verdict was attributable to passion or prejudice.

This Court has held that in actions brought in the state courts under the Federal Employers' Liability Act, the measure of damages, being inseparably connected with the right of an action, is a matter of federal law and must be settled in accordance with the principles of law as administered in the federal courts. **Chesapeake & O. R. Co. v. Kelly**, 241 U. S. 485, 60 L. ed. 1117.

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[2] It should be noted that petitioner has been subjected to a double remittitur in this case — one by the trial court and one by the Supreme Court of Missouri. The decision of the Supreme Court of Missouri, therefore, invades not merely the province of the jury, but that of the trial judge.

Furthermore, this Court has held that the amount of damages sustained by a plaintiff is an issue of fact for the jury to determine in the same manner as the facts relating to existence of liability itself. **Dimick v. Scheidt,** 293 U. S. 474, 79 L. ed. 603; and this Court has further held in **Lavender v. Kurn,** supra, that in actions brought under the Federal Employers' Liability Act, the appellate courts of the state may not on appeal redetermine the issues of fact which have been determined by the jury.[3]

Under the general principles of law as administered in the federal courts which, under the **Kelly** case the state courts are obliged to follow, the alleged "excessiveness" of the damages, in the absence of passion and prejudice, cannot be reviewed by the appellate court. This rule is specifically applicable to actions brought under the Federal Employers' Liability Act. **Searfoss v. Lehigh Valley R. Co.,** 76 F. 2d 762 (C. C. A. 2); **Armit v. Loveland,** 115 F. 2d 308 (C. C. A. 3); **Grand Trunk Western Ry. Co. v. Boylan,** 81 F. 2d 91 (C. C. A. 7). Cf. **Fairmont Glass Works v. Cub Fork Coal Company,** 287 U. S. 474, 77 L. ed. 439; **Miller v. Maryland Casualty Company,** 40 F. 2d 463 (C. C. A. 2). See **Southern Railway Company v. Montgomery,** 46 F. 2d 990 (C. C. A. 5); **Jacque v. Locke Insulator Corporation,** 70 F. 2d 680 (C. C. A. 2); **Peitzman v. City of Illmo,** 141 F. 2d 956 (C. C. A. 8).

It is clear from the decision and language of this Court in **Minneapolis & St. Paul Railroad Co. v. Moquin,** 283 U. S. 520, 75 L. ed. 1243, that this is no mere matter of "procedure" to be governed by the law of the forum. In the **Moquin** case, which was an action under the Federal Employers' Liability Act in the state court, a verdict for the plaintiff was rendered which the petitioner-

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[3] And, since the trial court sustained the verdict to the extent of $25,000, the issue of fact had been determined not only by the jury but the trial judge as well.

defendant moved to set aside on the ground that the verdict had resulted from an improper appeal to passion and prejudice on the part of plaintiff's counsel. The state's supreme court held the verdict excessive on this ground and ordered remand and reversal for a new trial, unless the petitioner-plaintiff should consent to a remittitur. This Court, reversing the judgment of the state supreme court, held it error to enforce a remittitur, directing instead a remand for a new trial. This Court stated:

> "Nor need we inquire into the rules applicable in trials under state law. Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial. . . ."

The only intimation to the contrary is that contained in Mr. Justice Holmes' dictum in **Union Pacific Railroad Co. v. Hadley**, 246 U. S. 330, 62 L. ed. 751 (1918). In that case, which was an action brought in the state court under the Federal Employers' Liability Act, the defendant appealed to the state court which ordered a remittitur as a condition of affirmance. The defendant brought the case to this Court, claiming that the State Supreme Court was required as a matter of law to reverse and remand for a new trial. In the course of an opinion by Mr. Justice Holmes, which rejected the defendant's contention, this Court stated, *obiter,*

> "The court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high."

Examination of the opinion of the State Supreme Court in the **Hadley** case makes it clear that the alleged excessiveness of the verdict as referred to by Mr. Justice Holmes was based not upon the grounds urged in the instant case, but upon the fact that the jury had not taken

account of the plaintiff's contributory negligence, and that the verdict was thus erroneous as a matter of law.[4]

The **Hadley** case presented a far different situation from that which obtains in the instant case in which the Supreme Court of Missouri has undertaken, in the absence of any error of law by the trial court, to enforce a "rule of uniformity" by which maximum amounts are set for recovery for particular types of injuries.[5] This in effect constitutes an enforcement by the state appellate court of a policy for which the federal statute does not call. Indeed, a state statute limiting the amount of recovery for wrongful death or particular injuries is not applicable in an action under the Federal Employers' Liability Act. **C. R. I. & P. R. Co. v. Devine**, 239 U. S. 52, 60 L. ed. 140. By similar reasoning it is not admissible for appellate courts of the state to impose rules of law as to the measure of damages which in effect limit the amount recoverable under a federal statute in a manner directly contrary to the rules of law prevailing in the federal courts.

It is respectfully urged that this case raises an important question in the application and interpretation of

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4 The Court, in Mr. Justice Holmes' opinion, stated at 246 U. S. 330, 333, 62 L. ed. 751, 755:

> "The court, after instructing the jury that Cradit assumed the ordinary risks of his employment, but not extraordinary ones, in a form that is not open to criticism here, instructed them further that he was guilty of contributory negligence, and that, under the statute, if the jury found it necessary to consider that defense, his negligence was to go by way of diminution of damages in proportions explained. The jury, in answer to a question, found that nothing should be deducted for the negligence of the deceased, and found a verdict for $25,000, which was cut down to $15,000 by the trial court, and to $13,500 by the supreme court. There were intimations that the jury disregarded the instructions of the court, and on that footing the defendant claims the right to a new trial in order that the jury may determine the proper amount to be deducted, since that was a matter that the court had no right to decide."

5 Joice v. M.-K.-T. R. Co., 354 Mo. 439, 189 S. W. 2d 568, 576-577; Goslen v. Kurn, 351 Mo. 395, 173 S. W. 2d 79, 89-90; Mooney v. T. R. R. Assn. of St. Louis, 353 Mo. 1080, 186 S. W. 2d 450, 455-456; Aly v. T. R. R. Assn. of St. Louis, 342 Mo. 1116, 119 S. W. 2d 363; Harlan v. Wabash R. Co. (Mo. Sup.), 73 S. W. 2d 749, 759.

the Federal Employers' Liability Act by the state courts which should be determined by this court for the guidance of the state tribunals. Many of the state courts follow the federal rule which permits reversal or enforced remittitur of the lower court's judgment only where the "excessiveness" of the verdict results from passion or prejudice, or from some error of law in the trial of the case. Karberg v. Southern Pac. Co., 12 Cal. App. 2d 200, 52 P. 2d 285-293; Sherman v. So. Pac. Co., Cal. App., 93 P. 2d 812-818; Atlantic Coast Line R. Co. v. Tomlinson, 21 Ga. App. 704, 94 S. E. 909, 910; Western & A. R. R. v. Lochridge, 39 Ga. App. 246, 146 S. E. 776, 782-783; Ga. 152 S. E. 475, 482; Pittsburgh, C. C. & St. L. R. Co. v. Smith, 190 Ind. 656, 131 N. E. 517; Ill. Cent. R. Co. v. Cheek, 152 Ind. 663, 53 N. E. 641, 646; Slatinka v. U. S. Ry., Admr., 194 Ia. 159, 188 N. W. 20, 25-26; Steele v. Atl. Coast Line R. Co., 103 S. C. 102, 87 S. E. 639, 644; Smith v. So. Ry. Co., 207 S. C. 179, 35 S. E. 2d 225; Pryor v. Safeway Stores, 196 Wash. 382, 83 P. 2d 241-244; Simons v. Kalin, 10 Wash. 2d 409, 116 P. 2d 840, 846; Musgrove v. Manistique & L. S. Ry. Co., 259 Mich. 469, 244 N. W. 132; L. & N. R. Co. v. Jolly's Admx., 232 Ky. 702, 23 S. W. 2d 564, 571. In a few other states appellate courts redetermine the amount of damages but, except possibly in Arkansas, no "uniform maximum" for particular injuries has been established. L. & N. R. Co. v. Parker, 223 Ala. 626, 138 So. 231, 250; L. & N. R. Co. v. Grizzard, Ala., 189 So. 203; C. R. I. & P. R. Co. v. Caple, Admr., 207 Ark. 52, 61, 179 S. W. 2d 151; Mo. Pac. R. R. Co. v. McKaney, 205 Ark. 907, 917, 171 S. W. 2d 932; Chi., R. I. & P. Ry. Co. v. Brooks, 155 Okla. 53, 11 P. 2d 142. The practice of the Supreme Court of Missouri, if unchecked, is certain to create confusion and uncertainty as to the proper practice in all the states. Cf. Stott v. Thompson, Tr., 294 Ill. App. 450, 14 N. E. 2d 246, 254; Avance v. Thompson, 320 Ill. App. 406, 51 N. E. 2d 334, 340; Joice v. M.-K.-T. R. Co., 354 Mo. 439, 189 S. W.

2d 568, 576; Jones v. Pennsylvania R. Co., 354 Mo. 439, 182 S. W. 2d 157, 158-159, and Heminghaus v. Ferguson (Mo. Sup.), 215 S. W. 2d 481, 485-486.

Regardless of the ultimate decision on the merits, the issue in this case merits discussion and elucidation by this Court. If not only the courts of the various states, but state and federal courts sitting in the same state, are to assign varying degrees of finality to the verdict of a jury and the judgment of a trial court, all in actions arising under a single federal statute, confusion and uncertainty are certain to multiply. The problem is one which clearly calls for an exercise of this Court's jurisdiction under Rule 38.

Respectfully submitted,

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